Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-159

**TOWN OF BABYLON and
TOWN OF HEMPSTEAD,**

Petitioners,

-against-

**NATIONAL ADVERTISING COMPANY,
INCORPORATED VILLAGE OF LINDENHURST,
TOWN OF OYSTER BAY, INCORPORATED,
VILLAGE OF FREEPORT, TOWN OF ISLIP,**

Respondents.

PETITIONERS' SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

This brief is submitted in support of Petitioners', Town of Babylon and Town of Hempstead, Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit respecting new cases available since the filing of the petition and in reply to the brief in opposition submitted by Respondent National Advertising Company, (hereinafter "National').

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITION SHOULD BE GRANTED, SINCE THE TEST PROMULGATED BY THE COURT OF APPEALS IS INTERNALLY FLAWED, IS CONTRARY TO THE HOLDINGS OF THIS COURT, IS IN CONFLICT WITH THE POSITION OF SEVERAL OF THE OTHER CIRCUITS, AND UNDERMINES THE BASICS PRECEPTS OF CONSTITUTIONAL ANALYSIS.

Petitioners argue that the Court of Appeals for the Second Circuit crafted a new and distinct form of constitutional scrutiny which conflicts with the principles long established by this court, and permits it to circumvent the applicable first amendment standards. Petitioners further argue that the Second Circuit's test conflicts with the position adopted by several other circuits and is inherently flawed.

National Advertising Company (the Plaintiff below), in its brief in opposition, maintains that the test crafted by the Court of Appeals represents a mere extension of the general principle that a municipality bears the burden of justifying an ordinance which impacts upon free speech. National's argument misses the point. It is not the nature of the burden which Petitioners dispute, but the method of satisfying that burden. Moreover, National's position completely fails to appreciate the essence and effect of the Second Circuit's preliminary question.

Initially, National misconstrues *City of Renton v. Playtime*

Theatres, Inc., 475 U.S. 41, 106 S.Ct. 926, 89 L.Ed.2d 29 (1986). This Court's holding in that case functions to permit a municipality to sustain its burden by citing published opinions in lieu of empirical evidence. The mere presence or absence of a legislative purpose provision does not alter this precept. As long as the cases cited are relevant, a municipality is entitled to rely thereon. As this Court plainly stated, "The First Amendment does not require a city, before enacting ... an ordinance, to conduct new studies or provide evidence independent of that clearly generated by other cities, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem the city addresses." *City of Renton*, 475 U.S. at 51-52, 106 S.Ct. at 931. By requiring "extrinsic evidence" in the absence of a legislative purpose provision, the test crafted by the Second Circuit substantially undermines this court's holding in *City of Renton*.

Moreover, as both the existence of the governmental interest and the relationship between that interest and restrictions on outdoor signs has been established by this Court, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-512; 101 S.Ct. at 2882, 2892-2895, 69 L.Ed.2d 800 (1981); *Members of City Council v. Taxpayers for Vincent*, 446 U.S. 789, 806-807, 104 S.Ct. 2118, 2130, 80 L.Ed.2d 772 (1984); *see also, Board of Trustees of the State University of New York v. Fox*, —— U.S. ——, 109 S.Ct. 3029, 106 L.Ed.2d 308 (1989); *Regan v. Time*, 468 U.S. 641, 656, 104 S.Ct. 3262, 3271, 82 L.Ed.2d 487 (1984), Petitioners plainly satisfied their burden by citing the relevant opinions of this Court and the lower courts. The only remaining issue is the particular distinctions of the challenged ordinances. However, the Second Circuit refused to accord Petitioners their right to rely on those decisions. The Second Circuit's preliminary question directly

undermines *City of Renton,* and effects a refusal to recognize or apply *Metromedia, Members of City Council, Fox* and *Regan.*

Second, National fails to recognize that the commercial speech test applies only to the off-premises copy restrictions. A content-neutral restriction on speech will be upheld if it is narrowly tailored to serve a significant governmental interest, but it need not be the least restrictive or least intrusive means of doing so. *Ward v. Rock Against Racism,* —, U.S. —, —, 109 S.Ct. 2746, 2757-2758, 105 L.Ed.2d 661 (1989). *See also Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 642, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

In *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), this Court expressly held that a municipality possesses substantial interests in esthetics and traffic safety, which are sufficient to justify content-neutral regulations of outdoor signs and billboards. 466 U.S. at 806-807, 104 S.Ct. 2129-2130. See also *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 784, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). While this Court did not pass on San Diego's content-neutral restrictions in *Metromedia,* it has subsequently approved the holdings of other courts in this regard.

In *Regan v. Time, Inc.,* 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 987 (1984), this Court endorsed the conclusions of the United States Court of Appeals for the Ninth Circuit in *Baldwin v. Redwood City,* 540 F.2d 1360, 1368, (9th Cir. 1976), *cert denied,* 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d

223 (1977) (holding 16 foot area restriction per sign and aggregate area restriction of 80 square feet per parcel does not offend the First Amendment), the Supreme Court of New Mexico in *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 F.2d 565 (1982) (upholding number, height and size of restrictions on outdoor signs as serving substantial governmental interest in esthetics and traffic safety), and the Appellate Court of Illinois in *Krych v. Village of Burr Ridge*, 111 Ill.App.3d 461, 444 N.E.2d 229 (1982) (upholding height, size and construction restrictions on outdoor signs as serving substantial governmental interest in esthetics and traffic safety). *Regan*, 468 U.S. at 656, 104 S.Ct. at 3271.

Certainly it is now beyond dispute that substantial governmental interests in traffic safety and esthetics exist with respect to the regulation of outdoor signs. It is similarly clear that the height, size, location and design restrictions represent reasonable determinations of local legislatures which serve to protect and advance those firmly established governmental interests. The Second Circuit's standard, however, allows a court to circumvent these well-established principles.

Finally, the test itself is inherently flawed both in design and function. National's attempt to boot-strap that test and belittle its practical effect are simply unavailing. National fails to cite any authority for the existence or propriety of the two-pronged Preliminary Question itself, other than *Dills v. City of Marietta*, 674 F.2d 1377 (11th Circ. 1982), *cert. denied*, 461 U.S. 905, 103 S.Ct., 1873 76 L.Ed.2d 806 (1983), which is similarly flawed and misplaced. Further, its attempts to distinguish the opinions of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits cited by Petitioners on the sole grounds that the cases satisfied either one prong or the other, (i.e. if no

extensive evidence existed, a legislative purpose provision was contained in the statute, or vice versa), are simply unavailing and the argument illusory. The cases cited by Petitioners simply do not stand for the principles National espouses. In none of those cases was a legislative purpose provision required prior to an evaluation of the relevant governmental interests; nor did the terms of such a provision restrict the scope of those interests. The issue was not whether a legislative purpose provision did in the abstract exist, but what effect the provision was accorded.

Similarly, the issue is not whether any evidence was offered, but whether such was required prior to an evaluation of an asserted governmental interest, or whether such was offered to establish such an interest when this Court has recognized both the interest and the nexus between the interest and the type of regulation in question.

The position of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits clearly rejects that of the Second and Eleventh Circuits. *See National Advertising Company v. City of Orange*, 861 F.2d 246 (9th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987); *Georgia Outdoor Advertising v. City of Waynesville*, 833 F.2d 43 (4th Cir. 1987), *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied* 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 1865 (1987); *Frumer v. Cheltenham Township*, 709 F.2d 874 (3rd Cir. 1983); *Wheeler v. Commissioner of Highways of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *John Donnelly and Sons v. Campbell*, 639 F.2d 6 (1st Cir. 1980) *aff'd.mem.*, 453 U.S.

916, 101 S.Ct. 3151 69 L.Ed.2d 999 (1981). As such, a conflict clearly exists.

Further, the position of those courts is in clear accord with the position of this Court, which provides that a court is not limited to receive assertions of governmental interests from the two sources delineated by the Second and Eleventh Circuits; and should assess all advanced governmental interests regardless of the existence of a legislative purpose provision or the offer of "extrinsic evidence", *Posadas de Puerto Rico Association v. Tourism Company*, 478 U.S. 328, 341-342, 106 S.Ct. 2968, 2976-2977, 92 L.Ed.2d 266 (1986).

The Second Circuit's test itself remains inherently flawed. The reliance on legislative purpose is misplaced, since it is elementary that the motivations of the enacting legislature are irrelevant and a statute will not be struck on the basis of an alleged illicit legislative motivation. Eg., *City of Renton v. Playtime Theatres*, 475 U.S. at 46-49, 106 S.Ct. at 928-930; *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968). The test also supplants governmental interest, the prime component in constitutional analysis, with legislative purpose, which is an issue restricted to statutory construction. Moreover, the abstract existence of extrinsic evidence does not determine whether constitutional analysis will be conducted. Further, the two enunciated factors do not restrict the parameters of the field of governmental interests which will be received. Finally, such evidence is simply not required in the present case.

The Second Circuit fabricated a new and distinct standard of constitutional scrutiny, internally flawed and at odds with the proclamations of this Court and several of the other cir-

cuits. That standard functions to allow a lower court to circumvent this Court's holdings. Such plainly demonstrates a compelling reason for granting the petition.

POINT II

SEVERAL RECENT DECISIONS FURTHER SUPPORT PETITIONERS' POSITION AND A GRANTING OF THE PETITION.

Further support for granting the petition may be found in the Fourth Circuit's recent decision in *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990), in which the court considered a municipal ordinance which restricted the height of radio antennas. The statute plainly embraces First Amendment concerns regarding both commercial and non-commercial speech. The single paragraph ordinance did not contain any legislative purpose provision. (See Columbia, South Carolina City Code § 6-3099). The Court did not require any "extrinsic evidence" to establish the governmental interest in regulating the height of such structures. The Fourth Circuit upheld the ordinance as a valid content-neutral restriction and not an unconstitutional infringement on the right of free speech.

The conflict which exists between the circuits on an issue of prime import, in itself, provides an important reason for granting the petition. When combined with the conflict between that position and the stated position of this Court, and the impact the test can foster upon the effectuation of the holdings of this Court, the reasons for granting the petition are compelling.

Additional support may also be found in this Court's recent opinion in *Hodgson v. Minnesota,* —— U.S. ——, 110 S.Ct. 2926, —— L.Ed.2d —— (June 25, 1990), which concerned a Minnesota abortion statute that required parental notification and a 48-hour waiting period between notification and perfomance of the abortion. While the case does not concern commercial speech, similarities between that case and the present do exist. (Further, the test delineated by the Second Circuit is not absolutely restricted to free speech cases, and bears the striking possibility of being applied more broadly). In *Hodgson* this Court did not require either a legislative purpose provision or "extrinsic evidence" in order to establish the "strong and legitimate (governmental) interests in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely, or that those interests justify a requirement that a minor notify and consult with a parent prior to the performance of an abortion". *Hodgson v. Minnesota,* —— U.S. at ——, 110 S.Ct. at 2942.

This Court relied entirely upon the principles expressed and reasoning inherent in its prior holdings to establish the governmental interests at issue and the nexus between those interests and the type of regulation at issue. *Id. See also* Minn. Stat. 144.343 which does not contain a legislative purpose provision. (This Court did however rely upon the findings of fact reported in the opinion of the District Court after trial in analyzing the particular provisions which distinguished the Minnesota Statute from parental notification and consent statutes, the court had cause to previously examine; *see Hodgson v. Minnesota,* —— U.S. at ——, 110 S.Ct. at 2937-2941.)

Quite plainly, the test delineated by the Second Circuit

remains inapposite to the position of this Court and, given the ability of that standard to undermine the implementation of the holdings of this Court, there exists compelling reasons for granting the petition.

CONCLUSION

The opinion of the Second Circuit creates a new and distinct standard of constitutional scrutiny which provides that unless a municipality can either produce a legislative purpose provision inherent within the statute or offer "extrinsic evidence" of the concerns which motivated the legislature to enact the statute, a court will not conduct constitutional review and will strike the statute in its entirety. The test thus functions as a new and distinct preliminary question in all free speech cases, and lends itself to a broader application. Further, that test directly conflicts with the position of this Court and permits a lower court to circumvent this Court's prior holdings. The position of the Second Circuit, while harmonious with that of the Eleventh Circuit, conflicts with that of the First, Third, Fourth, Fifth, Sixth and Ninth Circuits.

Moreover, the test itself is internally flawed. It confuses legislative motivation with governmental interest and elevates the former from its role in statutory construction and interjects it, in place of the latter, into constitutional analysis. The test then intertwines legislative purpose with the unrelated evidentiary issue of "extrinsic evidence," and requires, contrary to the proclamations of this Court, that such evidence must, in the abstract, be offered in order for the statute to be afforded constitutional scrutiny.

Finally, the test imposes additional and substantial burdens

upon the legislature without providing any corresponding benefit to those who wish to engage in the regulated activity or the population in general.

It is clear that, in the present case, special and important reasons exist for the granting of this petition.

Respectfully submitted,

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